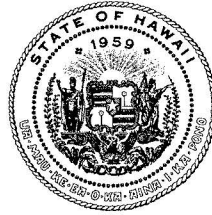
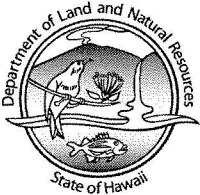


LINDA LINGLE
GOVERNOR OF HAWAII



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

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CONSERVATION AND RESOURCES ENFORCEMENT
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KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

**TESTIMONY OF THE CHAIRPERSON
OF THE BOARD OF LAND AND NATURAL RESOURCES**

**on House Bill 2350, House Draft 1 – Relating To Landowner Liability for Natural
Conditions**

**BEFORE THE HOUSE COMMITTEE ON
JUDICIARY**

February 26, 2008

House Bill 2350, House Draft 1 clarifies common law regarding non-liability of landowners regarding natural conditions on their land that cause damage outside the land. The Department of Land and Natural Resources (Department) supports this measure.

This is an issue that affects many private landowners that are protecting and managing public trust resources on their lands – and much of the public lands managed by the Department. The Department is responsible for managing the forest reserve the Natural Area Reserve Systems, which together comprise nearly 800,000 acres of land. The vast majority of these lands are unimproved according to the definition set forth in House Bill 2350, House Draft 1. The Department also regulates development activities on lands in the Conservation District, comprising approximately two million acres of land, or roughly half of the lands in the State. The Department primarily tries to keep these lands in a natural state that provides the watershed, forests, native habitats and open space that support our cherished quality of life. In the last 10 years, new and productive public/private watershed partnerships have been created out of recognition of the need to manage these unimproved conservation lands at a landscape level – and maintain their conservation values. These unimproved conservation lands, both public and privately owned, continue to fulfill their purpose and serve the public interest.

With increased population, urban and residential development continues to expand and build on any available parcel of developable land. Because of current or prior zoning decisions, many residential areas are adjacent to unimproved conservation lands. This has created a situation that may put some property owners and individuals at risk from rocks and landslides originating from these lands. A similar hazardous situation exists with the ocean, many live in close proximity to the ocean and that puts property owners and individuals at risk from storms and tsunamis. Many of our citizens have accepted these risks in exchange for the benefits of living near the mountains or by the ocean.

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The current trend in the law is to hold landowners responsible for actions emanating off their land that affect their neighbor. Act 82, Session Laws of Hawaii 2003, was passed to provide the

State and Counties with protection from liability for damages caused by dangerous natural conditions in unimproved recreational areas within their lands. This bill provides limited liability to owners of unimproved lands from injuries outside the boundaries of their land caused by naturally occurring land failure originating on their unimproved land. This measure is wise public policy because it does not penalize the landowner of unimproved conservation lands for the results of acts of nature. It removes one of the major disincentives - the liability exposure for naturally occurring acts – from the private conservation landowner and encourages them to keep and maintain their conservation lands.

The Department recognizes the terrible personal tragedy that can result from natural catastrophes such as landslides, tsunamis, floods and hurricanes. Exposure to rockfall and landslide can be mitigated by restrictive zoning during the permitting process to prevent development in a potential rockfall zone and mitigated by using rockfall barrier fences, hillside settling ditches, protective netting, or selective removal of rocks. The Department believes that mitigation of these hazards should be built into the process and cost of developing property in hazardous areas, just as is done in tsunami, flood or hurricane zones and supported by appropriate insurance coverage with restrictive zoning and building limitations. Greater scrutiny needs to be applied during the permitting processes to prevent further development in hazardous areas.



KAMEHAMEHA SCHOOLS

TESTIMONY TO THE HOUSE COMMITTEE ON JUDICIARY

By

Kelly LaPorte, Outside Counsel for the Kamehameha Schools

Hearing Date: Tuesday, February 26, 2008
2:45 p.m., Conference Room 325

Monday, February 25, 2008

TO: Representative Tommy Waters, Chair
Representative Blake K. Oshiro, Vice Chair
Members of the Committee on Judiciary

SUBJECT: Support of H.B. No. 2350, H.D. 1 – Relating to Landowner Liability for Natural Conditions.

My name is Kelly LaPorte, and I am outside counsel for the Kamehameha Schools. I am providing this testimony in support of H.B. No. 2350, H.D. 1 relating to landowner liability for natural conditions. This Bill codifies common law that protects State, County and private landowners who have not altered the natural condition of their land.

This Bill provides clarity with respect to liability from naturally occurring dangers, insulating up-slope landowners who have not altered the natural environment on their property, and is consistent with both common law and the Restatement of the Law of Torts. In two recent court cases involving a rockfall, Onishi v. Vaughan, and a massive mud and boulder slide, Makaha Valley Towers v. Board of Water Supply, after substantial litigation, the First Circuit Court in both instances acknowledged the applicability of this law when no artificial improvements have been constructed to create any additional risk. We've attached copies of the Hawaii Revised Statute section that adopts common law, the treatises that restate this law, and the order in the Onishi case.

By codifying common law, this Bill provides certainty in Hawaii law for natural conditions that exist on unaltered lands. Further, by expressly allowing minor improvements on land, it allows a reasonable use of natural land without triggering additional responsibilities. Expressly allowing minor improvements such as utility poles provides benefits to the community at large or, in the case of protective fences or warning signage, enhances safety. Importantly, the provision in this Bill that allows other, specified minor alterations of land, such as the *removal* of potentially dangerous natural conditions such as boulders or rocks, allows voluntary acts undertaken by either the landowner or owners of neighboring property without increasing the risk of liability.

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KAMEHAMEHA SCHOOLS

Monday, February 25, 2008

Representative Tommy Waters, Chair
Representative Blake K. Oshiro, Vice Chair
Members of the Committee on Judiciary

This is essentially a Good Samaritan provision that will encourage cooperation in voluntarily undertaking such measures intended to enhance safety. In the absence of this provision, a landowner may be reluctant to remove or alter any natural condition or allow others to come onto the land to do the same for fear of losing protection afforded by the common law.

By expressly allowing minor alterations of the land, such as allowing recreational visitors like day hikers on a hiking path, this similarly promotes the reasonable use and enjoyment of natural land, without losing the protection of this law. The Hawaii legislature has already deemed this an important public policy in its enactment of Chapter 520, which purpose is to “encourage owners of land to make land . . . available to the public for recreational purposes by limiting their liability towards person entering thereon for such purposes.” This Bill is consistent with this purpose.

In the absence of this Bill, landowners who, to date, have kept their land in a natural condition will possess a disincentive to keep the land in its unaltered state because of potential liabilities. Instead, these landowners possess an incentive to either develop the land or sell it to third parties for development. To the extent that the State, Counties, and Public Land Trusts acquire unaltered land for preservation, and conservation purposes, this Bill protects them. Passage of this Bill will promote sustainable communities by encouraging the retention of natural lands, while at the same time protecting consumers by fostering proper planning and consideration of appropriate safeguards.

After reviewing initial draft of this Bill with legislators, we received feedback that governmental entities should be treated in the same manner as private landowners as under common law. Consequently, we submit the attached proposed draft amendment to the bill. We also provide a table explaining the basis for each provision in the proposed draft, and its practical application. In sum, landowners – both private and government – should be insulated from liability of any damage as a result of the natural condition of the land as recognized by common law, and should be encouraged to allow limited, reasonable use of their natural lands without losing this protection. Kamehameha Schools respectfully requests that you pass this important Bill, as amended.

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H.B. No. 2350-HD2

Relating to landowner liability for natural conditions.

Benefits of statute

Provides certainty in the law regarding obligations for natural conditions that exist on unaltered land:

- Expressly allows minor improvements on land such as erecting utility pole and signs without triggering additional obligations.
- Expressly provides exception for specific, minor alterations of land taken for preservation or prudent management of land.
- Avoids unnecessary litigation with respect to passive landowners who do not alter natural state of land.
- Protects consumers by fostering proper planning and consideration of safeguards in risk-creating activities outside the land.

Encourages sustainability of communities:

- Encourages retention of natural land within developed areas.
 - In the absence of statute, owners of natural land possess:
 - disincentive to retain land in natural state because of potential liabilities from naturally occurring land failures; and
 - incentive to either develop natural land or sell natural land to third parties for development.
- Allows modest recreational activities (walking, hiking) on natural land without creating additional obligations of landowner.

Encourages voluntary measures to reduce risks of naturally occurring land failures without triggering additional obligations.

Encourages prudent land management practices such as plantings and weed, brush, and tree removal without triggering liability.

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Language	Basis for Provision	Practical Application
<p>§663-B Land failure on unimproved land caused by natural condition; liability.</p> <p>A landowner shall not be liable for any damage, injury, or harm to persons or property outside the boundaries of such land caused by any naturally occurring land failure originating on unimproved land.</p>	<p>This <i>codifies</i> common law, which is adopted in Hawaii under HRS § 1-1, and is consistent with the Restatement (Second) of Torts § 363 as to “natural conditions,” and expressly applies it to landowners.</p>	<p>Under this common law rule, if the landowner does not create any condition that creates a risk of harm to others outside the land caused by a naturally occurring land failure, the landowner has no affirmative duty to remedy conditions on the property of purely natural origin.</p> <p>The First Circuit Court recognized and applied this common law rule in 2005 in the <u>Onishi</u> lawsuit. This rule did not alter the outcome in that case, however, because the court held that the factual issue of whether artificial conditions (i.e., non-natural conditions created by upslope City roadway, drainage culvert, or privately owned driveway that diverted water) caused the rockfall would have to be determined by a jury. Given these substantial alterations of the land in <u>Onishi</u>, the proposed statute would not have provided immunity to landowners because the land was improved (not “unimproved”).</p> <p>This provision does <i>not</i> alter any obligations that a landowner may have to persons <i>on</i> that landowner’s property, such as the State’s duty to warn visitors to the Sacred Falls State Park that the First Circuit Court held was violated following the 1999 rockfall that killed and injured visitors to the public park.</p>

<p>§663-C Natural condition. For purposes of this part, the natural condition of land exists notwithstanding (1) minor improvements, such as the installation or maintenance of utility poles and signage;</p>	<p>This provides <i>clarity</i> and <i>certainty</i> in the application of the law by expressly providing that <i>minor improvements</i> placed on unimproved land that are not likely to increase the risk of naturally occurring land failures will not trigger an affirmative duty upon landowners to remedy conditions on the property of purely natural origin.</p>	<p>An owner of unimproved land may erect signage on the land that warns visitors of dangers that may exist <i>on</i> the land, or may provide easements to allow electrical or telephone companies to place utility poles that provide service to the public, without fear that doing so would trigger additional obligations to remediate any conditions unrelated to such improvements. In the absence of allowing for such minor improvements to be placed on natural land, landowners may refuse to install minor improvements that are intended to safeguard against dangers within the land. Further, this may restrict the availability of land needed by utilities to provide service to the public.</p>
<p>(2) minor alterations undertaken for the preservation or prudent management of the unimproved land, such as the installation or maintenance of fences, trails, or pathways or maintenance activities, such as forest plantings and weed, brush, boulder, or tree removal; or</p>	<p>This similarly provides <i>clarity</i> and <i>certainty</i> in the application of the law by expressly providing that <i>minor alterations</i> undertaken on unimproved land for preservation or maintenance purposes will not trigger an affirmative duty upon landowners to remedy conditions on the property of purely natural origin.</p>	<p>An owner may make <i>minor</i> alterations to natural land, such as unpaved trails or paths or installing fences to protect a watershed area, that are used for management of the land, or allow visitors to traverse the land for recreational purposes such as hiking with minimal disturbance to the natural conditions, without losing protection of this law. This promotes the reasonable use of the land that is unlikely to create additional danger of land failures, and allows the visitation of natural land without creating additional liabilities.</p>

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(3) the removal or securing of rocks or boulders undertaken to reduce risk to downslope properties.

An owner of unimproved land may also volunteer to remove rocks or boulders that may pose a danger to others outside the land without triggering a duty to remedy all *other* conditions of purely natural origin, or allow downslope residents to do the same without creating additional duties owed to downslope residents. Essentially, this encourages Good Samaritan acts without increasing liability. In the absence of this provision, a landowner may be reluctant to undertake *any* minor alterations that are intended to reduce risk because of a fear of losing immunity under the common law rule.

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Report Title:

Unimproved Land; Liability

Description:

Codifies common law regarding non-liability of landowners regarding natural conditions on their land that cause damage outside the land.

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A BILL FOR AN ACT

RELATING TO LANDOWNER LIABILITY FOR NATURAL CONDITIONS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. The legislature finds that it is in the best interest of the public to provide certainty in the law with respect to the legal duties and obligations of landowners arising from the inherent risks of land failures caused by natural conditions to persons and property outside the boundaries of such land when these risks have not been created or increased by artificial improvements or alterations to the land.

The purpose of this Act is to codify the common law that currently exists in Hawaii with respect to the legal duties and obligations pertaining to damages and injuries caused by natural conditions to property and persons outside the land.

SECTION 2. Chapter 663, Hawaii Revised Statutes, is amended by adding a new part to be appropriately designated and to read as follows:

"PART . UNIMPROVED LAND LIABILITY

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§663-A Definitions. As used in this part:

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"Naturally occurring land failure" means any movement of land, including a landslide, debris flow, mudslide, creep, subsidence, rock fall, and any other gradual or rapid movement of land, that is not caused by alterations to, or improvements constructed upon, the land.

"Unimproved land" means any land upon which there is no improvement, construction of any structure, building, facility, or alteration of the land by grading, dredging, or mining that would cause a permanent change in the land area on which it occurs and that would change the basic natural condition that exists on the land.

§663-B Land failure on unimproved land caused by natural condition; liability. A landowner shall not be liable for any damage, injury, or harm to persons or property outside the boundaries of such land caused by any naturally occurring land failure originating on unimproved land.

§663-C Natural condition. For purposes of this part, the natural condition of land exists notwithstanding (1) minor improvements, such as the installation or maintenance of utility poles and signage; (2) minor alterations undertaken for the preservation or prudent management of the unimproved land, such as the installation or maintenance of fences, trails, or pathways or maintenance activities, such as forest plantings and weed, brush, rock, boulder, or tree removal; or (3) the removal

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or securing of rocks or boulders undertaken to reduce risk to downslope properties."

SECTION 3. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

SECTION 4. If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 5. In codifying the new sections added by section 2 of this Act, the revisor of statutes shall substitute appropriate section numbers for the letters used in designating the new sections in this Act.

SECTION 6. This Act shall take effect upon its approval.

INTRODUCED BY: _____

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